EXHIBIT 6
DATE 2/22/2013
HB 467

James C. Nelson
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February 18, 2013

Judiciary Committee of the Montana House of Representatives

Re: HB 467

I write in support of HB 467, which would require that judges in justice courts of record and in city courts of record have the same qualifications as municipal court judges.

I practiced law in Montana for nearly 20 years; I served 14 of those years as the Glacier County Attorney; I served as Justice on the Montana Supreme Court for nearly 20 years; and, in those nearly 40 years, I have prosecuted and sat as a judge on hundreds of criminal cases. Based on my experience, I can tell you without equivocation that those who represent themselves in such cases—whether by choice or chance—are typically incapable of making the motions, objections, calling the witnesses, and cross-examining the prosecution's witnesses effectively and in such a manner so as to preserve a record for appeal.

For this reason, I have long believed that those persons, who are tried in a justice or city court of record, should be entitled to a trial or proceeding proceeded over by an experienced and trained lawyer.

As you know, in the justice and city courts of record, there is no trial de novo on appeal to the District Court. Rather, the District Court simply examines the record and rules on any errors of law properly preserved in the lower court record. The problem is that if error in the lower court proceedings is not properly preserved by appropriate motions, objections, evidence and cross-examination, the District Court has little or nothing to review. The litigant is, thus, effectively denied a proper appeal because of his or her lack of knowledge of the law and the nuances of criminal procedure at the trial level.

In those circumstances, there is every reason to believe that the defendant's rights to substantive due process and equal protection of the law are adversely implicated. All persons accused of a criminal offense are, in my view, entitled to one trial

presided over by a judge who has a law degree and appropriate training. It is the obligation of the presiding judge to insure that each party has a fair trial and substantial justice; if that is not accomplished at the lower court level, then it must be by means of trial de novo in the appellate court.

HB 467 will go a long way toward insuring that those goals are met. Accordingly, I urge your favorable consideration of this bill.

Respectfully,

James C. Nelson
Justice, Montana Supreme Court,
Retired.

Katherine M. Bidegaray
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February 19, 2013

Judiciary Committee of the Montana House of Representatives

Re: HB 467

I support HB 467. Currently, litigants unsatisfied with the outcome of a case in a justices' or city court NOT OF RECORD are entitled to a trial anew (trial *de novo*) to be tried in all respects as other trials in the district court. Conversely, when a justices' or city court is OF RECORD, there is no right of appeal *de novo*. Instead, the litigants must appeal on the record and prove that the trial judge made an error. §25-33-301, MCA, §46-17-311, MCA; Justice & City Court Civil Procedure Rule 24. HB 467 requires judges in justices' and city courts OF RECORD to have the same qualifications as municipal court judges: to be attorneys with three years' experience practicing law in Montana.

I am one of 46 district court judges. Prior to my election 10 years ago, I practiced law in Montana for nearly 17 years, during which I represented people in all varieties of civil matters, served as a public defender, and filled in as a Deputy County Attorney. I had the opportunity to represent people in city courts, justices' courts, district courts, and the Montana Supreme Court. My experience showed me that constitutional rights are better protected when at least one person with a law degree and experience practicing law is part of the legal process.

Whether justices' and city courts make a record has little impact on the quality of the justices' or city court proceedings or the manner in which the city or justices' court judge presides over the case, but it has great impact on the district courts if the outcome is appealed. If every non-attorney judge in a justices' or city court were allowed to be OF RECORD, every appeal would be confined to the record and questions of law. My opportunity to observe non-attorneys preside over justices' and city courts

convinces me that trial *de novo* is a better way to achieve due process and equal protection than appellate review of the record.

If people appearing before non-attorney judges of the courts of limited jurisdiction (city and justices' courts) are denied trial *de novo*, why do any judges need a law degree or any number of years' experience practicing law in Montana? The education required to obtain a law degree makes a difference in the level of due process afforded to people. Attorneys' education and experience practicing law make a difference in the application of the Rules of Civil Procedure, Rules of Criminal Procedure, and the Rules of Evidence. Accordingly, the Montana Constitution reflects the value of formal legal training and experience in that Article VII, Section 9, requires Supreme Court Justices and District Court Judges to have resided in Montana for two years and to have practiced law in Montana for at least five years prior to appointment or election. The same provision in the Constitution gives the Legislature the power to set the qualifications of the judges in other courts.

Allowing non-attorneys to preside over courts of record has fiscal impact. As it is, district court judges handle appellate review of records from some justices' and city courts. In those instances in which I have reviewed records from courts of limited jurisdiction, I listen to a very bad quality tape recording of a hearing. It takes me longer to listen to that tape recording than it took the judge to hear the case and longer than it would take me to hear the trial *de novo*. It would be much more efficient and effective simply to redo the trial.

Some may view a trial *de novo* as a second bite of the apple. It is not—it is a different kind of bite than appellate review. Allowing non-attorneys to preside over courts of record does not eliminate an apple bite, it just changes it so that district courts review a poor record created by lesser trained people rather than simply re-doing the matter with a better-trained person experienced in practicing law in the state. The reason for the different type of bite of the apple—trial *de novo*—is that the first bite likely involved no one trained in the law. It is more effective (a better use of time and resources) to have the second bite, if one is necessary, to be trial *de novo* in the district court, where at least the judge is trained and experienced in the law, than to make the judge trained and experienced in the law review an often completely illogical record created from the failure to follow the rules of civil procedure, criminal procedure, and evidence. At

least when the Montana Supreme Court reviews a District Court record, there is a transcript and the proceedings basically comport with the rules.

If this bill fails, the likely message will be that all courts of limited jurisdiction should be of record. There would be fiscal impact. Every city and county would have to install good sound systems and hire employees to make and transcribe the record. If the cities and counties did not hire employees to make or transcribe the record, the state would have to hire such employees and also likely purchase equipment with which to have the newly-hired state employees listen to and transcribe the tape recording made in the justices' or city court.

Requiring District Courts to review records created in courts over which non-attorneys preside hampers due process and equal protection because review will likely be of a very poor quality tape recording, rather than a transcript, and the substance of the recording will often include much irrelevant information and exclude necessary information. Allowing non-attorneys to continue to preside over courts of record will undoubtedly substantially increase the cost to District Courts and delay justice. Justice really depends on people ultimately having a right to a hearing before a qualified person. Substantive due process and equal protection mandate a hearing before a qualified neutral judge whose main job is to safeguard individual rights. The education that precedes a law degree, and the actual experience of practicing law in Montana, both help attorney judges know what those rights are and how to assure their protection. Only licensed attorneys know what it means to be responsible to clients, and how to organize and present cases to courts. A person needs to have done a job before that person really is qualified to supervise and judge others' in doing that job. Due process and equal protection demand that courts from which there is no appeal *de novo* be presided by attorney-judges with experience. Please pass HB 467.

Respectfully,

Katherine M Bidegaray

Katherine M. Bidegaray
District Court Judge
Montana Seventh Judicial District

NINETEENTH JUDICIAL DISTRICT

STATE OF MONTANA

Lincoln County

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JAMES B. WHEELIS
DISTRICT JUDGE

DEBBIE KAMBEL
Court Administrator

BARBARA J. BENSON
Senior Law Clerk

Members of the Committee:

I am writing to recommend your approving Representative Wilmer's bill that would require a justice of the peace and a city judge presiding over a court of record meet the same qualifications as a municipal court judge must under 3-6-202.

There are two reasons for my urging this step. The first is that under 3-10-115 and 46-17-311, a person appealing a justice court decision or verdict does not have a right to a trial de novo before the district court. The district court sitting as an appellate court is confined to the record, just as it is on administrative appeals and just as the Montana supreme court is on appeals from district court. That puts more pressure on the justice or city court to rule correctly. I'm not suggesting that people who haven't been to law school cannot be competent in applying the law. Nor am I suggesting that a law degree means that all rulings would be correct. Certainly the two justices of the peace and the city judges whose appeals I hear in Lincoln County are skilled and intelligent and should not feel obliged to defer to any attorney. But speaking generally, requiring a legal education of a judge who will sit on the only factfinding bench in a case means less chance of a mistake that could require another trial.

Secondly, the United States supreme court in *North v. Russell*, 427 U.S. 328 (1976), ruled that one charged with a misdemeanor is not denied due process, even when facing confinement, where a trial *de novo* is provided on appeal. To my knowledge, it has not spoken to the other side of that issue, whether an accused is deprived of due process or equal protection if tried before a lay judge without the possibility of a *de novo* trial on appeal. But the question will come up. Conviction of some misdemeanors, such as driving under the influence, partner or family member assault, or cruelty to animals, serves as a predicate offense to a later prosecution for a felony. This means that the integrity of convictions in lower courts will be scrutinized. One way to protect the record in those cases is to eliminate a challenge to a conviction because it was obtained before a lay judge without possibility of a guaranteed new trial before an attorney judge.

Thank you very much for considering my remarks.

Sincerely,

JAMES B. WHEELIS
District Judge

SWANDAL LAW PLLC

& Mediation Center

127 S. C Street Livingston, MT 59047

REBECCA R. SWANDAL KENDRA K. ANDERSON WM. NELS SWANDAL

January 29, 2013

Dear Representative Wilmer:

I write in support of your bill that would require judges in city courts of record and justices' courts of record to have the same qualifications as municipal court judges: to be attorneys with at least three years' experience.

There are four types of trial courts in Montana. District courts have full general jurisdiction, and district judges must be lawyers with 5 years' experience. The courts of limited jurisdiction are municipal courts, justices' courts and city courts. Municipal courts are of record and municipal judges must be lawyers with three years' experience.

City courts and justices' courts are of two types: of record, and not of record. At present there is no requirement that judges in either type be lawyers. Generally, these courts are not of record. I think of them as "peoples' courts" because the parties often are not represented by lawyers and often the judges are not lawyers. The protection people have is they can appeal to the district court for a whole new trial, without giving a reason.

People lose that right if a city court or justices' court becomes a court of record. Appeals from those courts must be based on the record and must show that the trial judge made an error. Making a good record requires expertise and as a practical matter requires legal representation. Appealing from such a court is a technical matter again requiring representation.

So, it is harder to appeal from one type of justices' or city court than another. Yet in both types of courts there is no requirement that the judges are lawyers and the probability of error in both types is the same. This is unfair. There should be a higher standard for judges in courts of record than in courts not of record. Judges in all courts of record should be educated in the law.

As a former judge I am interested in ensuring that all people who appear before the courts of this state receive justice. While I have had the pleasure of working with some dedicated lower court judges in Park and Sweet Grass Counties, they are not lawyers and do not know all the nuances of the law that is required to do justice in each case. While a very small percentage of the cases from those courts are appealed, I have found that a high percentage of those that are appealed have a legitimate reason for doing so.

I believe that your bill will make the system fairer by creating the same standard of competence in all limited jurisdiction courts of record.

Sincerely,

Wm. Nels Swandal

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